No. 93-733

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In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN POZSGAI AND GIZELLA POZSGAI, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Acting Assistant Attorney General

ROBERT L. KLARQUIST
VICKI L. PLAUT
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Commerce Clause of the Constitution, Article I, Section 8, Clause 3, authorizes congressional regulation of wetlands that are adjacent to, but above the headwaters of, tributaries of navigable waters, as provided for by Section 404 of the Clean Water Act, 33 U.S.C. 1344, and applicable regulations.

2. Whether the definition of "pollutant" in Section 502(6) of the Clean Water Act, 33 U.S.C. 1362(6), to include certain materials "discharged into water" includes the discharge of materials onto wetlands.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 999 F.2d 719. The orders of the district court (Pet. App. 28a-32a, 34a-37a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1993. A petition for rehearing was denied on August 10, 1993. Pet. App. 39a. The petition for a writ of certiorari was filed on November 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a civil enforcement action instituted by the United States in the United States District Court for the Eastern District of Pennsylvania under Section 309(b) of the Clean Water Act, 33 U.S.C. 1319(b). The district court found petitioners liable. The court of appeals affirmed. Pet. App. 1a-27a.[1]

1. The Clean Water Act, 33 U.S.C. 1251 *et seq.*, is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 101(a), 33 U.S.C. 1251(a). Section 301(a) of the Act, 33 U.S.C. 1311(a), provides that "the discharge of any pollutant by any person shall be unlawful" unless it is authorized by a permit issued by the Army Corps of Engineers pursuant to Section 404, 33 U.S.C. 1344. See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985). The definitional Section of the Act, in turn, defines "pollutant" to include any dredged or fill material, Section 502(6), 33 U.S.C. 1362(6); it defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters," Section 502(12), 33 U.S.C. 1362(12); and it defines "navigable waters" to mean "the waters of the United States," Section 502(7), 33 U.S.C. 1362(7).

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[1] In related criminal proceedings, petitioner John Pozsgai was convicted of criminal violations of Section 309(c) of the Clean Water Act, 33 U.S.C. 1319(c). The district court sentenced him to three years of imprisonment, to be followed by five years of probation, and a $200,000 fine (which subsequently was reduced to $5,000). The court of appeals affirmed, 897 F.2d 524, and this Court denied a petition for a writ of certiorari, 498 U.S. 812 (1990).

The Act divides responsibility for administration between the Environmental Protection Agency (EPA)—which has general responsibility for administering the Act, "[e]xcept as otherwise expressly provided," Section 101(d), 33 U.S.C. 1251(d)—and the Army Corps of Engineers—which has the authority to issue permits allowing discharges into navigable waters, Section 404(a), 33 U.S.C. 1344(a).[2] The Corps has promulgated regulations that define "waters of the United States" to include:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce * * * ;
>
> * * * * *
>
> (5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;
>
> * * * * *
>
> (7) Wetlands adjacent to waters * * * identified in paragraphs (a)(1) through (6) of this section.

33 C.F.R. 328.3(a) (1987).[3]

Those regulations also define the term "wetlands" to mean:

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[2] Section 404(a) refers to the "Secretary," but Section 404(d) defines the term "Secretary" to mean "the Secretary of the Army, acting through the Chief of Engineers." 33 U.S.C. 1344(d).

[3] The 1987 regulations, originally promulgated at 51 Fed. Reg. 41,239 (1986), were in effect at the time of the conduct at issue in this case. The EPA also promulgated substantially identical regulations. 40 C.F.R. 230.3(s) (1981). For the sake of clarity, this brief refers only to the Corps regulations.

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

33 C.F.R. 328.3(b) (1987). In *Riverside Bayview Homes*, this Court sustained that regulatory framework, explaining that it was "reasonable for the Corps to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined." 474 U.S. at 133.

2. This case involves a 14-acre site in Morrisville, Pennsylvania. As the court of appeals explained, that site is "a forested wetland dominated by arrowwood," with "areas of standing water * * * scattered throughout the site." Also, "[a] stream flows along the east border of the property * * * [that] is a tributary to the Pennsylvania Canal," which flows into the Delaware River. When the Corps learned in April 1987 that fill material was being dumped onto the property, Martin Miller (a Corps field investigator) examined the property. He determined that the great majority of the property was wetland and that petitioner John Pozsgai[4] had deposited "fill (concrete rubble, earth, and building scraps) in three portions of the wetland for the purpose of raising the elevation." After his examination, Miller advised petitioner that he should not place any more fill in the wetland por-

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[4] For convenience, references in this brief to "petitioner" in the singular refer to petitioner John Pozsgai.

tions of the property until petitioner obtained a permit from the Corps. Pet. App. 2a-3a; see *id.* at 34a.

In June 1987, petitioners purchased the property. After Miller observed in August 1987 that additional fill had been placed on the property, the Corps issued a September 3, 1987, cease and desist letter, ordering petitioners to cease "conducting, contracting, or permitting" further filling of the property. Miller observed additional filling on each of two subsequent visits to the property in October and November 1987, as a result of which the Corps issued a second cease and desist letter, on December 17, 1987. In May 1988, the Corps discovered that petitioner had discharged several hundred truckloads of fill onto the property. See Pet. App. 3a-4a.

3. On August 24, 1988, the United States instituted this action under 33 U.S.C. 1319(b), seeking civil penalties and an order that petitioners and the companies that had discharged the fill restore the property to its original condition. The government simultaneously moved for a temporary restraining order and a preliminary injunction; the court granted the temporary restraining order. After petitioner continued dumping, the court held him in contempt and granted a preliminary injunction against further dumping. See Pet. App. 4a-5a.

On January 8, 1990, the district court issued an order concluding that the property was protected wetland because of its physical characteristics and because it is adjacent to an unnamed tributary of the Pennsylvania Canal, which flows into the Delaware River. The court accordingly entered a permanent injunction against any further filling and ordered the land to be restored. Pet. App. 34a-37a.

4. Petitioners filed a motion to reconsider, contending (among other things) that their activities did not violate the Clean Water Act because the discharge of fill onto wetlands is not a discharge of a pollutant "into water" within the meaning of Section 502(6) of the Clean Water Act, 33 U.S.C. 1362(6). The district court denied the motion. Pet. App. 28a-32a. The court reasoned that the term "water" in the Clean Water Act includes "wetlands." *Id.* at 31a.

5. The court of appeals affirmed. Pet. App. 1a-27a.

a. The court first considered petitioners' statutory argument, that the filling of wetlands does not constitute a discharge "into water" within the meaning of the Clean Water Act. Pet. App. 8a-16a. The court noted that the Act applies only to a "discharge of any pollutant," 33 U.S.C. 1311(a), and that the definition of "pollutant" is limited to materials that are "discharged into water," 33 U.S.C. 1362(6). The court relied heavily, however, on the definition of "discharge of a pollutant" in 33 U.S.C. 1362(12), which refers to the addition of materials "to navigable waters." The court rejected petitioners' contention that the reference to "water" in Section 1362(6) cannot include wetlands, even though this Court had already concluded (in *Riverside Bayview Homes*) that the term "navigable waters" does include wetlands. Accordingly, in the court's view, the breadth of the reference to "navigable waters" applies throughout the Act, which thus applies to any discharge of covered materials into navigable waters. Pet. App. 9a-10a.

b. The court also rejected petitioners' claim that application of the Act in this case extended beyond the powers bestowed on Congress by the Commerce Clause of the Constitution. Pet. App. 21a-24a. The

court explained that application of the statute is constitutional "if there is a rational basis for the congressional determination that the regulated activity affects interstate commerce, and if the means chosen to regulate the activity are reasonable." *Id.* at 21a (internal quotation marks omitted). The court rejected petitioners' argument that the government must establish an individualized impact on commerce in each case, explaining that the cases on which petitioner relied interpreted statutes in which "Congress chose to satisfy the Commerce Clause by requiring an individualized interstate commerce effect in each application of the law." *Id.* at 22a.

The court of appeals also rejected petitioners' argument that any effect on commerce was insufficiently substantial to satisfy the Constitution because the discharge in question was made into wetlands above the headwaters.[5] Pet. App. 22a-24a. The court explained that the government has made an "expert determination that, in the aggregate, discharge into wetlands above the headwaters which are adjacent to tributaries of waters used or usable in interstate commerce, increases water pollution," *id.* at 23a, and accordingly upheld application of the statute in this case.

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[5] Applicable regulations define "headwaters" as "the point on a non-tidal stream above which the average annual flow is less than five cubic feet per second." 33 C.F.R. 330.2(b) (1987). The regulations grant a blanket, nationwide permit for certain discharges into wetlands above headwaters, but that permit did not apply to petitioners' discharges. 33 C.F.R. 330.5(a)(26) (1987); see Pet. App. 19a-20a.

ARGUMENT

1. Petitioners' primary argument (Pet. 8-19) is that Congress's power under the Commerce Clause of the Constitution, Article I, Section 8, Clause 3, is not sufficient to support application of the Clean Water Act to restrict filling of wetlands that are adjacent to tributaries of navigable waters at a location above the headwaters of those tributaries, except in cases where the government can make a specific showing that the filling has a substantial effect on interstate commerce. That claim is meritless.

Petitioners' argument hinges on their view that the government must establish that "in a majority of [cases, a discharge] would have significant effects on water quality or interstate commerce." Pet. 11. That view misapprehends this Court's modern decisions regarding the Commerce Clause, under which an exercise of the Commerce Clause power is valid if there is "a rational basis for finding that [the regulated activity] affected [interstate] commerce." *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258 (1964). Furthermore,

> [j]udicial review in this area is influenced above all by the fact that the Commerce Clause is a grant of plenary authority to Congress [that] * * * extends not only to the use of channels of interstate or foreign commerce and to protection of the instrumentalities of interstate commerce * * * but also to activities affecting commerce.

Hodel v. *Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 276-277 (1981) (internal quotation marks omitted).

Application of that standard to the activity in question here demonstrates that the Commerce Clause

clearly authorizes the regulations at issue. As the Court recognized in *Riverside Bayview Homes*, the government reasonably has concluded that the goal of the Clean Water Act—"protection of water quality and aquatic ecosystems"—can effectively be pursued only if the protection extends beyond the open waters themselves to wetlands adjacent to those waters. 474 U.S. at 133. The reason for that conclusion is obvious: "Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark * * * will affect the water quality of the other waters within that aquatic system." *Id.* at 134 (quoting 42 Fed. Reg. 37,128 (1977)). To put it more simply, it is unquestionably rational to conclude that a discharge of materials into wetlands adjacent to a body of water that flows into a navigable stream will affect the quality of the adjacent water, and thus eventually the navigable stream itself.

It is clear (as petitioner implicitly concedes) that the Commerce Clause authorizes regulation of the pollution of navigable streams. See *Hodel*, 452 U.S. at 282 ("[W]e agree with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution."). Because it is rational to conclude that the discharge of materials into the category of wetlands such as the wetlands at issue here has an effect on commerce subject to congressional regulation, petitioners' Commerce Clause argument fails.[6]

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[6] Petitioners' argument (Pet. 17-19) that "the agency has the burden of proving" in each case that there is an effect on interstate commerce is similarly inconsistent with this Court's

We are unaware of any decision of any court upholding a Commerce Clause attack on application of the Clean Water Act. Indeed, when the courts of appeals have addressed the question, they uniformly have upheld the constitutionality of the Act as interpreted by the Executive Branch, albeit in factual settings differing from those at issue here. See *United States* v. *Tull*, 769 F.2d 182, 185 (4th Cir. 1985) (wetlands adjacent to navigable waterway), rev'd on Seventh Amendment grounds, 481 U.S. 412 (1987); *Quivira Mining Company* v. *EPA*, 765 F.2d 126, 129-130 (10th Cir. 1985) (creeks that flowed into navigable stream), cert. denied, 474 U.S. 1055 (1986); *United States* v. *Byrd*, 609 F.2d 1204, 1209-1211 (7th Cir. 1979) (wetlands adjacent to an inland lake); *United States* v. *Ashland Oil and Transportation Co.*, 504 F.2d 1317, 1325-1329 (6th Cir. 1974) (wetlands adjacent to nonnavigable tributaries of navigable waterways).

2. Petitioners also repeat their argument that the Clean Water Act does not apply to the discharge of materials onto wetlands because that is not a discharge "into water" for purposes of Section 502(6) of the Act, 33 U.S.C. 1362(6). The court of appeals

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explication of congressional power in the area. As the Court explained in *Perez* v. *United States*, 402 U.S. 146, 156-157 (1971), the Commerce Clause does not require "particularized findings"; it is enough for Congress to determine rationally that an activity in its "national setting" is one that has a substantial effect on interstate commerce. Petitioner offers no sound reason for rejecting the legislative conclusion that the cumulative nationwide effect of discharges into wetlands adjacent to bodies of water that flow into navigable streams has a sufficiently substantial effect on interstate water quality to justify congressional action, even if the inquiry is limited to discharges that occur above the headwaters.

addressed that contention at length (Pet. App. 8a-16a), and we previously have responded to that claim in our brief in opposition to petitioner's challenge to his criminal conviction, Br. in Opp. at 12-13, *Pozsgai* v. *United States*, No. 89-1735 (O.T. 1990). The fundamental flaw in that contention is that it rests on the premise that the reference to "water" in Section 502(6) should be construed to exclude "wetlands" even though this Court already has held that the (arguably narrower) term "navigable waters" in Section 502(12) includes "wetlands," *Riverside Bayview Homes*, 474 U.S. at 133. The Court denied petitioner's earlier petition raising that question, 498 U.S. 812 (1990), and there is no reason for a different disposition in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Acting Assistant Attorney General

ROBERT L. KLARQUIST
VICKI L. PLAUT
Attorneys

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